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November 19, 2007

**VIA ELECTRONIC FILING (ECFS)**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, DC 20554

Re: *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172

Dear Ms. Dortch:

This letter responds to a series of misstatements, mischaracterizations, and untruths contained in a letter filed by Verizon in the above-referenced docket on November 6, 2007.<sup>1</sup> The fact that Verizon must go to such great lengths to twist and attempt to reshape the record in this proceeding constitutes perhaps the best evidence yet of the company's utter failure to meet its burden of proof. The undersigned carriers will not clutter the record by resubmitting evidence that has already repeatedly been produced; however we are compelled to highlight the primary fictionalized assertions in Verizon's submission.

- *Verizon's claim that "CLECs Fail to Provide Meaningful Data" has been proven to be untrue time and again.*<sup>2</sup> As was demonstrated in great detail in our correspondence to you dated November 2, 2007, competitive carriers and cable companies put substantial

<sup>1</sup> Letter from Joseph R. Jackson, Associate Director, Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 6, 2007), *modified*, Letter from Joseph R. Jackson, Associate Director, Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 7, 2007) ("Verizon's November 6 *Ex Parte* Letter").

<sup>2</sup> *See id.* at 2.

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data in the record in their comments and reply comments last Spring, and have continually supplemented that information in ex parte filings since that time.<sup>3</sup> The data submitted demonstrates without question that CLECs connect to fewer than one percent of commercial buildings with their own facilities.<sup>4</sup> Indeed, the record shows that even the most extensive CLEC fiber rings cannot be connected directly to a significant portion of commercial buildings in the affected markets within a commercially reasonable period of time.<sup>5</sup> CLECs have made these showings both by providing company-specific data on the number of buildings served,<sup>6</sup> and by filing data produced by GeoResults that aggregates information regarding all competitive carriers in the markets at issue.<sup>7</sup> The GeoResults data gives the Commission hard statistical evidence that all CLECs combined do not connect to more than a *de minimis* portion of commercial buildings in any individual wire center in any of the six MSAs subject to the Verizon Petitions.<sup>8</sup> Verizon's continued claims about a lack of CLEC data is nothing more than a thinly-veiled attempt to cover-up the fact that Verizon itself has been unable to produce evidence that CLECs serve a substantial portion of end user locations with their own local loop facilities – evidence that CLECs have not produced because it does not exist.

- *Verizon's rejection of GeoResults data ignores that it is the best evidence available to determine the overall state of competition in the enterprise market, and has been relied upon by both the Commission and the RBOCs repeatedly in the past.*<sup>9</sup> CLECs have supplied comprehensive GeoResults data that demonstrates beyond question that loop-based competition to enterprise customers in the affected markets is insignificant.<sup>10</sup> Verizon has made no effort to disprove these facts, other than a weak

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<sup>3</sup> See Letter from John J. Heitmann, Brett Heather Freedson, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 2, 2007).

<sup>4</sup> Letter from John J. Heitmann, Kelley Drye & Warrant LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 30, 2007) at 8-9 and Table 6 ("XO's October 30 *Ex Parte* Letter").

<sup>5</sup> *Id.* at 9-11 and Table 7.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *Id.* at 2-4 and Tables 1, 2.

<sup>9</sup> Verizon's November 6 *Ex Parte* Letter at 2-3.

<sup>10</sup> Letter from Brad E. Mutschelknaus, Genevieve Morelli, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 13, 2007) at 3 (CLECs' November 13 *Ex Parte* Letter"); XO's October 30 *Ex Parte* Letter. *See also*

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attempt to doctor the numbers with incorrect data from indeterminate sources and by double and triple counting the building instances found to occur.<sup>11</sup> Since even this effort failed to create a record of significant loop-based competitive market penetration, Verizon now contends that CLECs should have produced their own data rather than rely upon GeoResults aggregated counts. That, of course, is merely another attempt to divert the Commission's attention. No individual CLEC, or even all CLECs participating in this proceeding as a group, is able to compile data on every carrier that has deployed facilities -- each can supply information only about their own company.<sup>12</sup> However, GeoResults collects data on the extent of facilities deployment by virtually *all carriers* -- including 28 of the top 30 CLECs -- and thus is a much better source of information about the industry generally. Presumably for that reason, the FCC at the urging of RBOCs, including Verizon, has relied on GeoResults data in its decision-making in other important dockets -- such as *Triennial Review Order* and the *Triennial Review Remand Order*.<sup>13</sup>

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Opposition of ACN Communication Services, Inc. et al. at 27 and Exhibit A (filed Mar. 5, 2007) ("ACN et al. Opposition"); Comments of Cox Communications, Inc. at 27-28 (filed Mar. 5, 2007) ("Cox Comments"); Opposition of Time Warner Telecom Inc., Cbeyond Inc. and One Communications Corp. at 38-47 (filed Mar. 5, 2007) ("TWTC et al. Opposition"); Comments of Broadview Networks Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC at 47-49 (filed Mar. 5, 2007) ("XO et al. Comments"); Reply Comments of Broadview Networks Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC at 13-17 (filed Apr. 18, 2007) ("XO et al. Reply Comments").

<sup>11</sup> See Letter from Joseph Jackson, Associate Director, Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 10, 2007) at Exhibits 1-3.

<sup>12</sup> Individual CLECs have in fact submitted data on their own market penetration, but the most comprehensive, best available evidence clearly is the *aggregated* information compiled by an independent and expert third party such as GeoResults. See, e.g., XO's October 30 *Ex Parte* Letter at 9-11 and Table 7.

<sup>13</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (rel. Aug. 21, 2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("Triennial Review Order"); *In the Matter of Unbundled Access to Network Elements (WC Docket No 04-313)*; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket

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- *Verizon provides no support for its contention that it has “demonstrated” the existence of “extensive” cable competition in each of the six MSAs.*<sup>14</sup> In the *Omaha Forbearance Order*, the Commission granted relief from Section 251(c)(3) unbundling requirements based in part on the substantial telephony market share of the cable operator in that market.<sup>15</sup> Verizon thus has an obligation to meet the same standard and prove that cable companies in each of the six MSAs match the market penetration level found in Omaha. However, one can search the record in vain for any specific cable telephony market share calculations supplied by the petitioner. Verizon appended a batch of E911 data to its reply comments as the basis for its assertion that cable telephony competition is extensive, but CLECs have plainly demonstrated that such E911 data is inherently unreliable and systemically overstates competitive carrier market entry.<sup>16</sup> As importantly, however, CLECs have shown that even the E911 data filed by Verizon does not demonstrate cable telephony penetration

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No. 04-313 and CC Docket No. 01-338, FCC 04-290, Order on Remand, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*”).

<sup>14</sup> Verizon’s November 6 *Ex Parte* Letter.

<sup>15</sup> See *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (rel. Dec. 2, 2005), *aff’d* *Qwest Corporation v. FCC*, Case No. 05-1450 (D.C. Cir. 2007) at ¶¶ 57, 62 (“*Omaha Forbearance Order*”); *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958 at ¶ 28 (rel. Jan. 30, 2007).

<sup>16</sup> Letter from COMPTel and Broadview Networks, Inc., Covad Communications Group, FDN Communications, NuVox Communications, XO Communications, LLC, Alpheus Communications, L.P., ATX Communications, Inc., Cavalier Telephone Corp., CloseCall America, Inc. DSLnet Communications, Inc., McLeodUSA Telecommunications Services, Inc., MegaPath, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., RNK Inc., segTEL, Inc., Talk America Holdings, Inc., TDS Metrocom, LLC and US Telepacific Corp. d/b/a Telepacific Communications to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 4, 2007) at 13-21 and (transmitting Supplemental Declaration of Joseph Gillan) (“CLECs’ September 4 *Ex Parte* Letter”); Letter from Brad E. Mutschelknaus, Genevieve Morelli, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 5, 2007) at 2-5, *modified*, Letter from Brad E. Mutschelknaus, Genevieve Morelli, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 14, 2007) at 3-5 (“CLECs’ November 5 *Ex Parte* Letter”); XO et al. Comments at 12-14, and Exhibits 1, 2; Cox Comments 27, 32.

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levels in any of the six markets satisfy the *Omaha* standard.<sup>17</sup> In addition, the cable companies themselves have filed penetration statistics that show they do not have market shares that were found to be required in Omaha.<sup>18</sup> Verizon thus has not met its burden of producing hard, reliable statistical evidence which the Commission has required before ordering forbearance from Section 251(c)(3) unbundling obligations.

- *Verizon is incorrect in contending that it has provided commercial agreements that enable CLECs to continue to compete where UNEs are eliminated.*<sup>19</sup> Verizon avers that the Wholesale Advantage agreements offered to CLECs when UNE-P was eliminated by the *Triennial Review Remand Order* are evidence that it will provide access to critical facilities on an economic basis even when UNEs are eliminated. But in fact the reverse is true -- the record shows that the Wholesale Advantage agreements have failed utterly to enable CLECs to continue to provide service to the mass market. As the prices built into the Wholesale Advantage agreements have ratcheted up over time, CLECs have stopped marketing to mass market customers and have allowed their existing customer bases to erode through attrition.<sup>20</sup> Moreover, where legacy customers have not yet discontinued their CLEC service, carriers such as AT&T have been forced to increase prices substantially to recoup the

<sup>17</sup> Letter from Brad E. Mutschelknaus, Genevieve Morelli, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 16, 2007); CLECs' November 13 *Ex Parte* Letter.

<sup>18</sup> *Id.* See also Letter from Michael C. Sloan, Davis Wright Tremaine LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 9, 2007) (transmitting data of Comcast Cable Communications, LLC); Letter from J.G. Harrington, Dow Lohnes PLLC to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 30, 2007) (transmitting data of Cox Communications, LLC); Letter from K.C. Halm, Davis Wright Tremaine LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 6, 2007) (transmitting data of Charter Communications, Inc.); Letter from Brian Murray, Latham & Watkins LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (transmitting data of Time Warner Cable Inc.); Letter from Philip J. Macres, Bingham McCutchen LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 9, 2007) (transmitting data of RCN Telecom Services, Inc.); Letter from Brian Murray, Latham & Watkins LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (transmitting data of Time Warner Cable Inc.).

<sup>19</sup> Verizon's November 6 *Ex Parte* Letter at 5.

<sup>20</sup> CLECs' September 4 *Ex Parte* Letter at 10-11; Comments of Integra Telecom Inc. at 4 (filed Mar. 5, 2007). See also *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Petition of McLeod Communications Services, Inc. at 14 (filed Jul. 23, 2007).

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sizable Wholesale Advantage cost increases.<sup>21</sup> It is obvious that these price increases will simply accelerate the steady UNE-P line loss, and that the Wholesale Advantage price inflation will succeed in driving legacy UNE-P providers from the market entirely in the near future.

- *Verizon's claims of competition in the wholesale market are grossly exaggerated.* In a weak attempt to convince the Commission that UNEs are unnecessary to compete, Verizon contends that CLECs will be able to obtain loop facilities from alternative sources of supply if UNEs are eliminated through forbearance. First, Verizon asserts that cable companies offer wholesale products, a claim that has been categorically disproved.<sup>22</sup> Second, Verizon alleges that fixed wireless providers offer substitute loop facilities.<sup>23</sup> But, while wireless loop technology has promise, the record is clear that it is not yet widely deployed and will not offer an alternative for the DS0 and DS1 loops, which are the most frequently used UNE facilities.<sup>24</sup> Third, Verizon points to the existence of multiple CLEC metro fiber rings in the markets at issue. The Commission dealt with the issue of competitive transport facilities in the *Triennial Review Remand Order*, and various wire centers in the six markets in this proceeding have been deemed unimpaired by virtue of the Commission's "transport test."<sup>25</sup> Importantly, this test, by linking competitive transport facilities to wire centers where competitors are collocated, approximates the real-world needs of competitive providers to obtain access to facilities. In contrast, it is meaningless to

<sup>21</sup> Letter from Andrew D. Lipman, Russell M. Blau, Philip J. Macres, Bingham McCutchen LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 1, 2007) at 1-2 (appending Petition of AT&T Communications of Virginia, LLC in PUC-2007-00090, filed Oct. 12, 2007).

<sup>22</sup> See ACN et al. Opposition at 27; Comments of Comcast Corporation at 4-5 (filed Mar. 5, 2007); Cox Comments at 27-28; Comments of Time Warner Cable Inc. at 19-21 (filed Mar. 5, 2007); TWTC et al. Opposition at 38-47; XO et al. Reply Comments at 13-17.

<sup>23</sup> Verizon's November 6 *Ex Parte* Letter at 6.

<sup>24</sup> *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers* (WC Docket No. 05-25); *AT&T Corp Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services* (RM-10593), Initial Comments of Covad Communications Group, NuVox Communications and XO Communications, LLC at 25, and Declaration of Ajay Govil on behalf of XO Communications, LLC at 11-12 (filed Aug. 8, 2007); Reply Comments of Covad Communications Group, NuVox Communications and XO Communications, LLC at 24-26 and Reply Declaration of Ajay Govil on behalf of XO Communications, LLC at 2-3 (filed Aug. 15, 2007).

<sup>25</sup> See 47 C.F.R. § 51.319(e).

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merely count metro rings without knowing whether they can be accessed by competitors. In addition, in attempting to show that competitive facilities exist, Verizon improperly conflates transport and loop facilities. Metro fiber rings may offer potential alternative sources of transport services where they are deployed, but they show nothing about whether alternative loop facilities are present. Here, the Commission must rely on evidence of CLEC lit buildings. As indicated earlier, the record shows beyond question that CLEC lit buildings comprise a small fraction of one percent of the markets at issue.<sup>26</sup>

- *Verizon provides no support for its claim that Special Access is a panacea for all ills.*<sup>27</sup> Verizon continues to insist that if CLECs lose access to UNEs they can migrate to the purchase of Verizon's Special Access offerings. To do so is to say the Congress got it wrong in the 1996 Act, and that the Commission got it wrong in its *Local Competition Order*, *Triennial Review Order* and *Triennial Review Remand Order* when it determined that the ability of new entrants to compete is impaired without access to *cost-based* unbundled ILEC facilities. The record is clear that Verizon's Special Access services are priced 50 to 300 percent higher than equivalent cost-based UNE facilities.<sup>28</sup> Even where CLECs are able to negotiate discounts on Verizon Special Access services, the record shows that the only significant negotiating leverage available to CLECs is their potential use of cost-based UNE facilities.<sup>29</sup> Thus, the elimination of UNEs would certainly greatly reduce, and may even eliminate, whatever little Special Access discounting already is occurring and upon which some CLECs have relied as an alternative to UNE usage.

As a work of fiction, Verizon's November 6<sup>th</sup> letter may merit an award. But it is a completely inaccurate description of the state of the record in Verizon's UNE forbearance proceeding. Verizon continues to make countless assertions without hard evidence to back them up – a fatal problem in any Commission proceeding but especially so here where the consequences are so critical for consumers. Verizon's requested relief does nothing less than cut the legs out from under its CLEC competitors in six key MSAs, covering eight states and

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<sup>26</sup> XO's October 30 *Ex Parte* Letter at 8-9 and Table 6.

<sup>27</sup> Verizon's November 6 *Ex Parte* Letter at 14.

<sup>28</sup> Back to the Future: The Verizon and Qwest Attempts to Undermine the TRRO, *Ex Parte* Presentation by Carl Grivner, Chief Executive Officer, XO Communications, Wayne Rehberger, Chief Operating Officer, XO Communications, Heather B. Gold, Senior Vice President/External Affairs, XO Communications, Brad E. Mutschelknaus, Kelley Drye & Warren LLP (Oct. 18, 2007) at 11; CLECs' September 4 *Ex Parte* Letter at 25-28.

<sup>29</sup> *Id.*

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potentially affecting 34 million consumers. This simply cannot be squared with the express instruction of Section 10 that the Commission consider whether the requested forbearance will “promote competitive market conditions” and “enhance competition among providers of telephone services.”<sup>30</sup> While granting the six Petitions will do much to enhance Verizon’s market power across the northeastern United States, it would undermine the facilities-based competition that has finally begun to emerge in those markets. Accordingly, the Petitions must be denied.

Respectfully submitted,



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<sup>30</sup> 47 U.S.C. § 160(b).